Supreme Court, U.S.
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No. 95-510

In The

# Supreme Court of the United States

October Term, 1995

HARRY D. THOMAS,

*Petitioner,*

v.

LAWRENCE WHALEN and EDWARD AMMANN,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Is a police officer's First Amendment right to speak out publicly on matters of public concern infringed by administrative actions by superior officers intended to prevent identification of the police officer as a police officer, where that officer exploited his badge, his rank, and his employment to enhance his credibility for personal gain?

2. In an action under 42 U.S.C. 1983, is qualified immunity available to executives of a police department who take reasonable administrative actions to preserve the integrity, order, efficiency and disciplining of the Police division against a police officer to prohibit the officer from making unauthorized public presentations, exploiting his employment to enhance his credibility for personal gain during speech which is not clearly protected?

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## STATEMENT OF THE CASE

This case stems from disciplinary action taken by police department officials against a Cincinnati Police Division officer who made several unauthorized public presentations, both written and oral, on behalf of the National Rifle Association ("NRA"), while wearing official insignia and identifying himself as a Cincinnati Police lieutenant.

Thomas, a lieutenant in the Cincinnati Police Division,[1] is an outspoken opponent of gun control laws and an active member of the NRA. On September 7, 1988, Thomas attended a rally in Washington, D.C. sponsored by the NRA to protest the Brady Bill. During the rally, Thomas appeared at a press conference and later spoke to various elected officials. He was dressed in civilian clothes, but verbally identified himself as a police officer.

Thomas alleged that after he returned from Washington, he had a conversation on September 18, 1988, with Assistant Chief Ammann, who at that time supervised the police bureau to which Thomas was assigned. According to Thomas, Ammann told Thomas that he was not a team player, could not expect to receive any support from the administration of the Police Division, and was ruining his career by this opposition to gun control measures. Allegedly, Ammann also told Thomas that he was to be transferred and that he would not be informed of the reasons for the transfer. That day, Thomas said, he was

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[1] The Cincinnati Police Division is a component of the Safety Department of the City of Cincinnati. Article V, Charter of the City of Cincinnati.

transferred from District 3 to District 2. According to Whalen and Ammann, however, Thomas was actually transferred on September 14, 1988, along with the other lieutenants, as part of a standard rotation.

On June 6, 1989, Thomas attended a second NRA sponsored rally in Washington. He again spoke to media representatives and again was dressed in civilian attire. But this time, at the request of the NRA, he wore his police badge on the left breast pocket of his suit coat. Thomas was introduced to the press as a member of the Cincinnati police force.

In mid-July 1989, Thomas wrote an essay expressing his views on gun control, entitled "Why Gun Laws Waste My Time". The essay appeared in a newspaper for members of Congress called *Roll Call*, and later became a full-page NRA advertisement, reproduced in several other publications. Whalen received a copy of the essay after its initial publication, but prior to its subsequent uses. In August 1989, Whalen instructed Thomas to answer, in writing, a list of questions regarding the essay. Thomas was also "advised [that] the Chief has not authorized it to be published in any commercial media in the future. If there is a possibility that this article may become commercial, it would be proper to stop same."

Also, in August 1989, Thomas' photograph appeared in a publication entitled *The Badge*, a publication which law enforcement members of the NRA receive free of charge. The photo showed Thomas at the Washington rally held on June 6, 1989, in civilian clothes with his badge displayed.

On October 15, 1989, Chief Whalen directed Thomas to submit to an internal affairs interview concerning his participation in the June 1989 rally. On November 6, 1989, Thomas received a written reprimand regarding his participation based on a violation of § 1.02 of the Police Division's Manual of Rules and Regulations and Disciplinary Process and § 18.135 of its Police Procedure Manual. Thomas was censured for displaying his badge and for being introduced as "Lieutenant Harry Thomas, Cincinnati Police Department"; for failing to request permission to attend the news conference; and for failing to complete a "Public Appearance Report" upon his return to duty.

During July 1990, Thomas spoke at a rally sponsored by the Ohio Constitutional Defense Council in Dayton, Ohio, again opposing gun control.

In October 1990, disciplinary charges were filed against Thomas for submitting a false affidavit in a court proceeding. The charges were found to be true, and Thomas was suspended for two days. However, he appealed the finding to the Civil Service Commission, which dismissed the charges.

On November 26, 1990, Ammann issued a written order to Thomas, regarding his responsibilities during public appearances and in attending court on behalf of a criminal defendant:

> You are not to appear in uniform, display any identification card, or display your Police Division badge.
>
> You are not to represent or identify yourself as a Lieutenant in the Cincinnati Police Division in

> any manner unless required through sworn court testimony.
>
> You will prohibit associates, affiliations, sponsors, etc. from making those representations on your behalf. . . .
>
> You will not attend court in an on duty status, nor will you be compensated by the Police Division. Your only compensation will be that provided to any other civilian witness; subpoena check.
>
> Nothing within this order prohibits you from exercising the same right as any other civilian in these matters.

Lt. Thomas brought this action against the former Chief of Police Lawrence E. Whalen[2] and former Assistant Police Chief Edward Ammann,[3] in their individual and official capacities, and the City under 42 U.S.C. § 1983. Thomas alleged that Colonel Whalen and Lt. Colonel Ammann " . . . have taken various steps intended to interfere with Plaintiff's exercise of his First Amendment Rights (sic) . . . and further intended to chill the future exercise of said First Amendment rights . . . ". Thomas alleged that Colonel Whalen and/or Lt. Colonel Ammann were responsible for eight discrete supervisory, administrative acts or decisions which "attempted" to violate his First Amendment rights: (1) transferred from a duty assignment; (2) attempted to prevent publishing of his "views" in articles and opinion pieces; (3) required

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[2] During the pendency of this lawsuit, Colonel Whalen retired from the Cincinnati Police Division.

[3] During the pendency of this lawsuit, Lt. Colonel Ammann retired from the Cincinnati Police Division.

answers to questions involving the content of published articles; (4) required interviews with the investigative unit of the Police Division; (5) issued orders directing him not to identify his employment with the Police Division in published articles; (6) issued orders concerning the use of official police vehicles; (7) included remarks in efficiency reports about his political beliefs, and (8) denied use of Special Weapons and Tactics Team. Thomas alleged that the City was liable for the " . . . actions of Defendants Whalen and Ammann as alleged . . . " because City officials "have taken no steps to correct or prevent such actions."

The City denied that any municipal policy had been the moving force to any alleged deprivation of free speech or had inflicted any constitutional injury. Colonel Whalen and Lt. Colonel Ammann denied that they had violated any clearly established rights of a public employee. They insisted that their actions were reasonably calculated under the circumstances to administer the Cincinnati Police Division without violating any well-established First Amendment rights.

Following the assignment of the district judge to the case by the Chief Judge of the Sixth Circuit Court of Appeals, the City and Messrs. Whalen and Ammann moved for summary judgment on April 17, 1993 on the grounds that there were no material issues of fact and they were entitled to judgment as a matter of law. The City asserted a right to judgment as a matter of law because the undisputed material facts demonstrated that a municipal policy was not the moving force that inflicted any alleged constitutional deprivation. Colonel Whalen

and Lt. Colonel Ammann also asserted qualified immunity from personal liability for any violation of the First Amendment. Thomas filed a memorandum in opposition. The District Court granted in part and denied in part the motion for summary judgment. The District Court found that a municipal policy or custom was not the cause or the moving force of any constitutional deprivation. Therefore, the City was entitled to summary judgment as a matter of law. However, the Court found that Messrs. Whalen and Ammann were not entitled to qualified immunity. While recognizing that case law "makes it difficult to ascertain whether specific rights are 'clearly established'," the District Court found that public employee rights to free speech were *generally* established in the Sixth Circuit. (emphasis added). Absent "actual evidence" of any adverse impact upon the Police Division, the Court could not conclude that either Police Chief Whalen or Assistant Chief Ammann were reasonable in response to Thomas' exploitation of his employment in the Police Division for his personal advocacy.

On October 13, 1993, Messrs. Whalen and Ammann appealed the judgment denying qualified immunity to the Sixth Circuit Court of Appeals. On April 21, 1995, the Court of Appeals found that the defendants took reasonable administrative action to preclude Lt. Thomas from exploiting his uniform and his position in the police department, while continuing to honor his First Amendment right to debate the propriety of gun control legislation. The Court of Appeals reversed the district court and concluded that the defendants did not violate a "clearly

established right" belonging to plaintiff, thus the two were entitled to qualified immunity from suit.

## SUMMARY OF ARGUMENT

Accommodating the competing societal values in suits against government officials, the Supreme Court has struck the balance in favor of cloaking government officials performing discretionary functions with qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). "We therefore hold that government officials performing discretionary functions *generally* are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added); *see also Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). In regard to government officials exercising discretionary functions, qualified immunity provides ample protection "to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991).

During all times pertinent to this litigation, Police Chief Lawrence Whalen and Assistant Chief Edward Ammann were senior officials vested with discretionary authority in the administration of the Cincinnati Police Division. Whether they may be personally liable for any unlawful official action depends upon the "objective legal reasonableness" of the action, assessed in light of the

legal rules that were "clearly established" at the time the action was taken. *Johnson*, 935 F.2d at 111 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

If a right the government official allegedly violated was clearly established at the time of the challenged conduct, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. To be outside the scope of qualified immunity, the very action in question need not have previously been held unlawful, but the unlawfulness must be apparent in light of pre-existing law. *Anderson*, 483 U.S. at 640.

Both Messrs. Whalen and Ammann were confronted with a Lieutenant in the Cincinnati Police Division who willfully abused and exploited his badge, rank, and position in the Cincinnati Police Division for the purpose of enhancing his credibility. Whalen and Ammann took reasonable administrative action to preclude Thomas from exploiting his badge and position in the Police Division, while respecting his First Amendment rights.

No court has recognized a right to use or abuse public employment solely for the purpose of enhancing credibility for personal gain. Public employment cannot be abused as a soap box from which an employee can enhance the credibility of his personal opinion. Instead, reasonable restrictions on the use of public employment to advance personal views have been found not to violate

any constitutional rights. *Detroit Firefighters Ass'n v. City of Detroit*, 508 F.Supp. 172, 177 (E.D. Mi. 1981).

A public employee's right to free speech is not and has not been clearly established within the context of qualified immunity. Moreover, a public employee does not enjoy any right to use or exploit his employment to enhance credibility in the debate of public issues. The contours of the public employee's right to free speech in the employment setting are, therefore, not sufficiently clear to a reasonable police official. Accordingly, Thomas' right of free speech within the context of his employment in the facts of this case was not clearly established when Police Chief Whalen and Lt. Colonel Ammann exercised reasonable administrative supervision over his exploitation of his position in the Cincinnati Police Division. These officers are thus entitled to qualified immunity.

## I. SUPERIOR OFFICERS' ACTIONS IN PROHIBITING THE USE OF POLICE INSIGNIA FOR IDENTIFICATION PURPOSES WERE REASONABLE FOR THE POLICE DIVISION TO MAINTAIN AN APPEARANCE OF IMPARTIALITY ON AN ISSUE OF PUBLIC DIVISIVENESS.

In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court reaffirmed the test to be used in determining whether the speech of a public employee is constitutionally protected:

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the

> interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." This balancing is necessary in order to accommodate the dual role of the public employer as a producer of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

*Id.* at 384-85 (citations omitted). Therefore a two-step process is necessary to determine whether the defendants could rightfully take adverse employment action against Thomas on the basis of his speech.

The initial inquiry is whether the speech that Thomas cites as the basis for defendants' actions "may be 'fairly characterized as constituting speech on a matter of public concern.' " *Rankin*, 483 U.S. at 384-85, (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)); *see also Wilson v. Littleton*, 732 F.2d 765, 769 (10th Cir. 1984) (First Amendment did not protect police officer who wore a black shroud across his badge to mourn death of police officer from another town; not a matter of public concern). Obviously, debate concerning gun control is a matter of public concern.

The next inquiry is into whether Thomas' interest in speaking freely is outweighed by a state interest in prompting the efficiency of public services. *Rankin*, 438 U.S. at 388. "The more central a matter of public concern the speech [or association] at issue, the stronger the employer's showing of counter-balancing governmental interest must be." *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991). The court is left to determine the appropriate balance. *Connick*, 461 U.S. at 150.

A police officer does not give up his right to free speech in exchange for his badge. *Biggs v. Village of Dupo*, 892 F.2d 1298, 1303 (7th Cir. 1990). Police officers are not relegated to a watered-down version of constitutional rights by virtue of their public employment, or because such employment is within a command-oriented agency of local government. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

However, in *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) the Supreme Court held that a law enforcement agency's "[c]hoice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." The Supreme Court has cited the importance of the military's fostering of instinctive obedience, unity, commitment, and espirit de corps in deferring to military uniform regulations when a public employee's First Amendment rights were at stake. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

A law enforcement unit, such as the police, has many of the same interests as the military in regulating its

employees' uniforms. In *United States Dep't of Justice v. Federal Labor Relation Auth.*, 955 F.2d 998 (5th Cir. 1992), the Fifth Circuit determined that allowing Immigration and Naturalization Service border patrol agents to wear union pins while on duty would create factionalism, interfere with discipline, and create an appearance of partiality. *Id.* at 1006. The court found that wearing union pins would interfere with an appearance to the public of neutrality and impartiality that is important to the mission of all law enforcement agencies. *Id.* at 1007. Similarly, the Cincinnati Police Division could regulate Thomas' wearing of his badge off-duty at times that would interfere with an appearance of neutrality or impartiality, such as an NRA rally.

Police officers need not hide the fact of public employment. In this case, however, Thomas was advertising and invoking his experience not just as a police officer, but as a highly ranked member of the Cincinnati Police Division, in a manner that entangled the Division in a matter of national controversy.

To be sure, several courts have recognized the interest of a governmental entity in preserving the appearance of impartiality. *See, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."); *Paulos v. Breier*, 507 F.2d 1383, 1386 (7th Cir. 1974) (recognizing and protecting interest of municipality in preserving nonpartisan police force and appearance thereof);

*Connely v. Walsh*, 412 F.Supp. 146, 158 (W.D. Mo. 1976) (upholding juvenile court's ban on partisan bumper stickers on employee cars; compelling state interest in preserving public confidence in judiciary outweighs plaintiff's interest in publicly expressing her political preference through a bumper sticker). The Sixth Circuit found that these arguments are particularly relevant when applied to police employment and gun control, and thus support the conclusion that the Cincinnati Police Division had an interest in maintaining neutrality. Also, Lt. Thomas did not have a clearly established right to use the police department's insignia in order to enhance his own credibility in advocating a political position.

## II. POLICE OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY WHEN UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE THE RIGHT OF A SUBORDINATE POLICE OFFICER IN THE CONTEXT OF HIS EMPLOYMENT TO EXPLOIT HIS BADGE, RANK, OR HIS EMPLOYMENT TO ENHANCE HIS CREDIBILITY FOR PERSONAL GAIN IS NOT CLEARLY ESTABLISHED.

The words "clearly established constitutional right" are not to be read so broadly as to defeat the norm of qualified immunity. The words "clearly established constitutional right" may not be used to read the defense of immunity out of federal law by the facile expedient of stating constitutional rights in the most general possible terms. *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993); *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). Rather, the right the official is alleged to have violated must have

been "clearly established" in a more particularized sense. *Anderson v. Creighton*, 483 U.S. at 640. "The right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful." *Colaizzi*, 812 F.2d at 308 (quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986)). "Courts require officials to adhere to rules that have been made specific enough to set operational guidelines." *Greenberg v. Kmetko*, 922 F.2d 382, 384 (7th Cir. 1991). The characterization of the right must be sufficiently particularized to enable the District Court to determine whether the officers were on notice that their actions violated clearly established law. *Rakovich v. Wade*, 850 F.2d 1180, 1211 (7th Cir. 1988). Such a particularized statement is necessary because officials can act without fear of litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

To determine whether a right is "clearly established," the Court must first define or characterize the government official's actions according to the specific facts of the case. *Rakovich*, 850 F.2d at 1209. In this case, Colonel Whalen and Lt. Colonel Ammann assigned a lieutenant in the regular rotation to a new district; investigated the unauthorized use of a lieutenant's badge and/or rank to advance the interests of a private organization; disciplined a member of the division for a violation of established rules and regulations; issued instructive guidelines and orders for future guidance to prevent exploitation of the badge, rank and position in the Cincinnati Police Division for advocating private interests; refused to cancel a parking citation in accordance with stated policy;

prepared an annual evaluation; and managed the deployment of SWAT. This description or characterization must then be compared to the body of law existing at the time of the alleged violation to determine if the actions of the Police Chief and Assistant Police Chief violated clearly established law. *Rakovich*, 850 F.2d at 1209.

A clearly established right can only be discerned from closely analogous cases. *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993). "While cases involving the exact fact pattern at bar are unnecessary, case law in a closely analogous area is crucial to permit us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly." *Rakovich*, 850 F.2d at 1209 (citations omitted).[4]

The inquiry must not focus upon any analogous case. Instead, a finding of a clearly established constitutional right in this Circuit must be supported by precedent from the Supreme Court or the Circuit in which the court sits, or in the alternative, by decisions from other Circuits. *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). "Although decisions of other courts can clearly establish the law, such decisions must both point unmistakably to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Mumford*, 4 F.3d at 432-33

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[4] "It is the plaintiff who bears the burden of establishing the existence of the allegedly clearly established right." *Rice v. Burks*, 999 F.2d at 1174 (quoting *Rakovich v. Wade*, 850 F.2d at 1209).

(quoting *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992)).

Thomas claims that the defendants have restricted his speech in two ways. He has been ordered when pursuing his NRA-type advocacy, (1) not to appear in uniform, display any identification card, or display [his] Police Division badge", and (2) not to "represent or identify [him]self as a Lieutenant in the Cincinnati Police Division". He admits that his speech and activities have not otherwise been restricted. Both the identification of Thomas as a police officer and the wearing of Thomas' police badge in conjunction with his lobbying is certainly communicative and particularly relevant to his comments in this arena; however, they must be analyzed separately to discern whether Thomas had a "clearly established right" in either area.

The Supreme Court has prescribed the particularized "clearly established" right standard to be:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

*Anderson*, 483 U.S. at 640 (citations omitted).

While it may be clear that a public employee does not forfeit his First Amendment rights entirely when he accepts public employment, "the scope of those rights in any given factual situation has not been well defined."

*Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986). In fact, the Supreme Court has made clear that such rights are not amenable to clear articulation in every factual setting. *Pickering v. Board of Educ.*, 391 U.S. 563, 569 (1968). "The Court was at pains to point out that, in view of the 'enormous variety of fact situations' in which critical statements by public employees may be thought by their superiors to furnish grounds for dismissal, it was 'not appropriate or feasible to attempt to lay down a general standard' for resolving the free speech claims of public employees and that it could only 'indicate some of the general lines along which an analysis of the controlling interests should run'." *Benson*, 786 F.2d at 276 (quoting *Pickering*, 391 U.S. at 569)).

"The Supreme Court has never established a bright-line test for determining when a public employee may be disciplined in response to the employee's speech." *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991) (citation omitted). In the absence of any "bright-line test" for determining when a public employee may be disciplined in response to the employee's speech, public officials should rarely be denied qualified immunity for taking disciplinary action in response to an employee's speech. *Id.*; *Dartland v. Metro. Dade County*, 866 F.2d 1321 (11th Cir. 1989); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021 (5th Cir. 1988); *Benson*, 786 F.2d at 276.

In *Dartland*, the United States Court of Appeals for the Eleventh Circuit observed:

> Because of this case-by-case approach, "[t]here will rarely be a basis for [an] *a priori* judgment that the termination or discipline of a public

> employee violated 'clearly established' constitutional rights." *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988). Because no bright-line standard puts the reasonable public employer on notice of the constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful.

*Dartland*, 866 F.2d at 1323.

Similarly, the United States Court of Appeals for the Fifth Circuit has assessed the implications of the case-by-case approach for determining qualified immunity to alleged violations of public employee First Amendment rights. In *Noyola v. Texas Dept. of Human Resources*, the court held:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated "clearly established" constitutional rights.

*Noyola*, 846 F.2d at 1025.

Public officials have been given only general guidelines which the Supreme Court, Courts of Appeals and District Courts apply case-by-case. Each case, therefore, becomes a fact specific inquiry. "[R]easonable government officials, knowing only that they must not infringe on [employee free speech rights], would not necessarily know just what conduct was prohibited." *Id.* at 1025

(citation omitted). "*Pickering* and its sequels stand for the proposition that speech on questions of public interest ought not be deterred too much, or for too little reason, making it almost impossible to formulate bright lines." *Greenberg v. Kmetko*, 922 F.2d 382, 384 (7th Cir. 1991). Consequently, public officials cannot discern clearly established rights of public employee free speech in the context of the *Pickering* balancing approach. "[U]ntil the constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been 'clearly established'." *Colaizzi*, 812 F.2d at 308. The right of public employees to speak in the context of public employment was not in 1991 or 1992 and is not today stated so that reasonably competent police officials would agree on its application. In this context of shifting interests of free speech and public efficiency, principles of immunity relieve governmental officials from having to decide, at their financial peril, how judges will balance these interests in the years to come. *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991).

Even the District Court, in denying Colonel Whalen and Lt. Colonel Ammann qualified immunity, observed that case law had not established any bright lines but resulted in imprecise standards. Such imprecision is exactly why Colonel Whalen and Lt. Colonel Ammann are immune from any personal liability. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (citations omitted).

"[T]he test for immunity should be whether the law was clear in relation to the specific facts confronting the

public official when he acted." *Colaizzi*, 812 F.2d at 308. Both Police Chief Lawrence Whalen and Assistant Chief Edward Ammann were confronted with a Lieutenant in the Cincinnati Police Division who willfully abused and exploited his badge, rank, and position in the Cincinnati Police Division for the personal gain of enhancing his credibility. In response, Colonel Whalen and Lt. Colonel Ammann took reasonable administrative action to preclude him from exploiting his badge and/or position in the Police Division while continuing to recognize his right to debate the propriety of gun control legislation.

No court has recognized a right to use or abuse public employment solely for the purpose of enhancing credibility for personal gain. Public employment is not and should not be abused as a soap box from which an employee can enhance credibility for his personal opinion. Instead, reasonable restrictions on the use of public employment to advance personal opinion have been found not to violate any constitutional rights. *Detroit Firefighters Ass'n v. City of Detroit*, 508 F.Supp. 172, 177 (E.D. Mi. 1981).

Clearly, an employee's right to free speech is not and has not been clearly established within the context of qualified immunity. Moreover, a public employee does not enjoy any right to use or exploit his employment to enhance credibility in the debate of public issues. Such imprecision in the standards to determine if a public employee's speech is protected or subject to restriction must lead to the incontrovertible conclusion that the contours of the public employee's right to free speech in the employment setting are not sufficiently clear to a reasonable police official. Accordingly, Thomas' right of free

speech within the context of his employment in the facts of this case was not clearly established when Police Chief Whalen and Lt. Colonel Ammann exercised reasonable administrative supervision over his exploitation of his position in the Cincinnati Police Division.

## III. POLICE CHIEF WHALEN AND ASSISTANT CHIEF AMMANN ACTED REASONABLY TO RESPECT GENERALIZED RIGHTS OF FREE SPEECH AND TO PRESERVE THE INTEGRITY, ORDER, EFFICIENCY AND DISCIPLINE OF THE POLICE DIVISION.

Because no bright-line standard had been clearly established to guide police officials in the supervision of subordinates attempting to enhance their personal credibility through the exploitation of their badge, their rank or their employment in the police division, Police Chief Lawrence Whalen and Assistant Chief Edward Ammann are entitled to qualified immunity unless reasonable police officials in their place would necessarily have known that supervision, admonition, evaluation, investigation, and discipline under the circumstances violated Thomas' clearly established right of free speech to use his employment as a soap box. *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991); *Dartland v. Metro. Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989). "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent [official] would have [supervised, admonished, investigated, or initiated disciplinary procedure]; but if [officials] of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Colonel Whalen and Lt. Colonel Ammann should not be held to the same standards as judges discerning legal principles and applying such principles to the facts of a case. Government officials should not be expected to become skilled in guessing the future path of the law. *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1980), *cert. denied*, 479 U.S. 848 (1986). "Governmental employees must obey the law in force at the time but need not predict its evolution, need not know that in the fight between broad and narrow readings of a precedent the broad reading will become ascendent." *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991). Rather, this Court should inquire if the facts confronting Police Chief Whalen and Assistant Chief Ammann were so compelling in favor of protecting Thomas' right of free speech that police officials of reasonable competence in their position at that time would necessarily know that transferring, supervising, admonishing, ordering, or initiating discipline against him violated his constitutional rights. *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 114 L.Ed.2d 76, 111 S.Ct. 1681 (1991).

Moreover, the Courts have also recognized and given deference to the need for maintaining a close working relationship in quasi-military organizations like police departments. *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992); *Busby*, 931 F.2d at 774. "Quasi-military organization. . . . generally by necessity must cast regulations in broad terms. . . . Additionally, institutions such as the . . . police have needs 'which must demand a high level of discipline and duty of their members in order to function effectively for the good of all members of society'." *Busby*, 931 F.2d at 774-75 (citation omitted). A police

organization must be given considerable deference to instill discipline and correspondingly restrict its employees. Consequently, the Courts have afforded police officials greater latitude in dealing with subordinates within the ranks. *Maciariello v. Sumner*, 973 F.2d at 300. The Police Chief and the Assistant Police Chief, therefore, have a special interest in maintaining loyalty, discipline, and in general, the reputation of the Police Division.

Both Police Chief Whalen and Assistant Chief Ammann have supervised, admonished, directed, and ordered Thomas to achieve a purpose unrelated to the suppression of his rights of free speech – namely, avoiding any appearance of impropriety which would cast doubt upon the integrity of the Division.[5] Avoiding the appearance of impropriety serves the integrity and efficiency of the Cincinnati Police Division. Preventing the erosion of public competence in the integrity of the police service is a compelling governmental interest. *Keefe v. Library of Congress*, 777 F.2d 1573, 1580-81 (D.C. Cir. 1985).[6]

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[5] Certain supervisory/administrative acts are unrelated to any exploitation of Thomas' badge, rank or position in the Police Division. Instead, these decisions were made in the regular course of administering the Cincinnati Police Division. Certainly a routine transfer along with other lieutenants has nothing to do with personal advocacy. A denial of a request to cancel a parking ticket received while off-duty cannot reasonably be construed to violate clearly established rights of free speech. A tactical decision to deploy SWAT cannot possibly be subjected to scrutiny for remote implications of free speech.

[6] Contrary to the opinion of the learned District Court judge, the Police Chief and the Assistant Police Chief need not

Thomas received a written reprimand not because of what he may have said or where he may have said it, instead, he was reprimanded because he used his badge, at the request of the NRA, to enhance his own credibility at a press conference. Police Chief Whalen requested answers to specific questions about a publication in which Thomas used his rank and association with the Police Division to enhance his own credibility. The Police Division initiated disciplinary action against him for misleading the court in the statement of his qualifications. Chief Whalen and Assistant Chief Ammann initiated these directives or admonitions to Thomas in order to avoid any appearance of impropriety by a ranking officer in the Cincinnati Police Division. The Police Division cannot tolerate its officers using their position for personal gain. Such an interest has been found to be a compelling justification for limiting a public employee's rights under the First Amendment. As the Court held in *Keefe v. Library of Congress*: ". . . it is inescapable that some off-duty activities of a public servant are incompatible with the undivided loyalty and integrity that [such a] person must show. . . . " *Id.* at 1580.

The Court of Appeals for the District of Columbia has found an administrative regulation prohibiting attendance at political conventions to be constitutionally permissible. *Id.* In *Keefe*, a Congressional Research Service

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prove that Thomas' conduct actually disrupted efficiency in the Police Division, "but only that an adverse effect was 'reasonably to be apprehended.' " *Maciariello v. Sumner*, 973 F.2d 295, 300 (7th Cir. 1992) (citations omitted).

("CRS") Analyst challenged a conflict of interest regulation which precluded off-duty attendance at political conventions. In upholding the constitutionality of the regulation, the Court found that nonpartisanship on the part of CRS Analysts enables them to serve all members of Congress effectively and to carry out Congress' mandate that the Service render advice without partisan bias. *Id.* at 1580-81. "Avoiding political activities may also prevent erosion of congressional and public confidence in the integrity of the Service." *Id.* at 1581.

Upholding the integrity and public confidence of the Cincinnati Police Division are similar compelling interests motivating the administration, supervision, admonition and discipline of this lieutenant. Police Chief Whalen and Assistant Chief Ammann diligently sought to preclude the unwarranted entanglement of the Cincinnati Police Division in NRA activities. Lt. Colonel Ammann issued prudent administrative guidelines to assure that the Police Division was not perceived as opposing reasonable gun ownership laws. The Police Administration initiated reasonable and limited administrative action to preclude exploitation of the Police Division for personal advocacy. Finally, the Police Chief and the Assistant Chief made routine administrative decisions unrelated to Thomas' personal opinions or his use of employment as a soap box for those opinions. A rotational transfer, a refusal to cancel a parking citation, and the marshalling of SWAT are objectively reasonable supervisory decisions. Certainly, neither this Court nor any court expects competent police supervision to shirk responsibility in order to avoid allegations of constitutional deprivations.

A reasonable police official would conclude that Thomas flagrantly entangled the Cincinnati Police Division in the partisan debate over gun ownership legislation. In particular, the Cincinnati Police Division could have been viewed as supporting or endorsing the NRA. Thomas' continual flaunting of police procedure could reasonably be found to demonstrate disloyalty, undermine discipline within the Police Division and generate unfavorable publicity for the Police Division. As a lieutenant responsible for the supervision of a shift in a district, Thomas would be expected to be an example for the officers assigned. Yet his example is one of flaunting police policy and exploitation of the division for personal gain. Certainly, no competent police chief would permit the department to be used as a soap box for the personal gain of a subordinate. Considering the reasonable interests in maintaining loyalty, discipline and a favorable reputation with the public, a police official could reasonably conclude that appropriate administrative, supervisory and disciplinary action was necessary. Accordingly, a reasonable police official in like circumstances to Police Chief Lawrence Whalen and Assistant Chief Edward Ammann could reasonably believe that administrative and disciplinary action in response to Thomas' exploitative and manipulative conduct was lawful and appropriate. Therefore, both Police Chief Lawrence Whalen and Assistant Chief Edward Ammann are entitled to qualified immunity.

## REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a review of a petition for a writ of certiorari is not a matter of right, but of judicial discretion. No special or important reasons exist in this case warranting the granting of a writ of certiorari. First, petitioner has not, nor can he, assert that a conflict exists on this issue between United States Courts of Appeals. Moreover, a conflict does not exist on this issue between state courts of last resort and a United States Court of Appeals or other state courts of last resort. Finally, for the reasons stated in the Summary of the Argument, the Sixth Circuit Court of Appeals did not render a decision that conflicted with applicable decisions of this Court. Therefore, this Court in its discretion should deny the petitioner a writ of certiorari pursuant to Rule 10.

## CONCLUSION

Neither Chief Whalen nor Assistant Chief Ammann violated any clearly established rights. Both Colonel Whalen and Lt. Colonel Ammann reasonably and competently supervised, admonished and ordered a subordinate officer without any impact upon his right to free speech. Accordingly, Chief Whalen and Assistant Chief Ammann are entitled to qualified immunity.

Although Thomas may not be required to conceal his employment as a police officer, his right to speak as a member of the Cincinnati Police Division is not clearly established when evaluated under the balancing test set out in *Rankin v. McPherson*, 483 U.S. at 384-85. The extra

margin of credibility lent his cause by exploiting his affiliation does not outweigh the Cincinnati Police Division's interest in preserving the appearance of impartiality in areas closely related to its core mission.

The Sixth Circuit Court of Appeals found that Whalen and Ammann did nothing to interfere with Thomas' ability to communicate his pro-gun message; their actions were designed simply to disassociate the Cincinnati Police Division from that message. Thomas has not been penalized in any appreciable way even when called to task: his career has not been set back, his salary remains the same, and he concedes that he continues his First Amendment activities. Because Thomas' right to involve the Division in his NRA advocacy is not clearly established by the proof, a burden that fell on Thomas, defendants Whalen and Ammann were correctly entitled to qualified immunity as a matter of law.

For all of the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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